Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, **DC 20554**

In the Matter ot	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	

COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its Comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.

NCTA is the principal trade association represenring the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers. In addition to providing multichannel video programming services, NCTA's cable operator members also provide high-speed Internet access service. and are increasingly offering local telephone service. NCTA's members also include more than 200 cable programming networks and services, as well as suppliers of equipment and services to the cable industry

INTRODUCTION

In this proceeding, the Commission is considering whether to modify and/or augment its rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"). Those rules restrict the time and manner in which telephones and fax machines may be used for solicitations to telephone customers. The rules require individual companies that engage in telemarketing to maintain a company-specific "do-not-call" list so that customers who choose not to be solicited by that company will not be called. The TCPA also authorizes (but does not require) the

Commission to create a national "do-not-call" list, and to generally prohibit companies from telemarketing to residential telephone subscribers who choose to be listed. The Commission has not implemented such a list, but it is now considering doing so.

Meanwhile, as the Commission has noted, the Federal Trade Commission is *also* considering the adoption of a national do-not-call list to prevent unwanted telemarketing solicitations. While the creation of two separate do-not-call lists subject to two separate sets of rules and regulations would be confusing to businesses and to consumers, there is a reason why, if the FTC chooses to implement a do-not-call list, FCC adoption of such a list would not be completely redundant. The reason is that the FTC's jurisdiction is statutorily limited, so that certain businesses – in particular, banks, credit unions, savings and loans, common carriers, nonprofit organizations and insurance companies – would not be subject to the restrictions on telemarketing to persons on the FTC's do-not-call list.

NCTA's members respect the privacy interests of consumers – both those who are already their customers and those whom they would like to persuade to *become* their customers. A national do-not-call List may enhance those privacy interests. Accordingly, NCTA has not opposed the adoption of such a list by the FTC, nor does it do so here. We do, however, have two overriding concerns, which we urge the Commission to take into account.

First, the TCPA exempts calls to persons "with whom the caller has an established business relationship" from the definition of "telephone solicitations" that would be restricted by a national do-not-call list. If the Commission decides to adopt a national do-not-call list, it should make clear that such a list does not preclude cable operators from calling customers with whom they have an established business relationship *and offering such customers the full range of services available over the system.* Such calls often provide consumers with benefits and

welcome service enhancements. Moreover, in today's marketplace, in which telephone companies, satellite providers and others offer competitive packages of video, telephone and Intel-ne1 sei-vices, cable operators need to let their customers know that they, too, offer such packages and additional services

Second, while it would not be a good idea for the FTC and the FCC to have two separate national do-not-call lists with disparate rules and regulations, it is important that *if* the FTC chooses to adopt such a list, the FCC adopt comparable rules and regulations to ensure that the businesses that are exempt from the FTC's jurisdiction are subject to the same restrictions on tclcmarketing to persons on the list as all other businesses. This is particularly important to NCTA's members, who provide services in competition with telephone companies, which may, to some extent, he exempt from the FTC's regulations

I. A NATIONAL "DO-NOT-CALL'' LIST SHOULD EXEMPT ALL CALLS TO CUSTOMERS WITH WHOM A COMPANY HAS AN ESTABLISHED BUSINESS RELATIONSHIP.

Telemarketing is one of the tools that cable operators use to retain their customers and to offer and sell customers additional services that they may wish to purchase. NCTA's member companies have found that the majority of their customers appreciate being kept informed of new products and services that suit their interests, especially when, as is often the case, there are special discounts and promotions associated with such products and services

The range of separately available sei-vices offered by cable operators has expanded dramatically in recent years. Since thc passage of the 1996 Telecommunications Act, the cable industry has invested over $55 billion in private capital to upgrade more than a million miles of plant with fiber optics and digital technology. This massive infrastructure upgrade – which is approximately SO percent completc – is providing the platform for offering a range of new,

advanced services to more than 70 million American households. These services include digital video (which offers more channels, better pictures, video-on-demand, and interactive electronic program guides) and high speed Internet access service, cable telephone services and interactive television.

Telemarketing is an efficient means of notifying and periodically reminding customers that these new broadband services have reached their neighborhoods and are available to them. It is useful for customers to know that additional services are available. But it has also become critically important to operators to be able to let their customers know about additional services. As operators become "full-service" broadband providers of video, voice and Internet access services, they find themselves in a highly competitive marketplace for all of those services. Keeping in touch with subscribers is important not only in order to sell additional services but also to compete effectively with alternative providers and *retain* subscribers to existing services.

Congress recognized, in authorizing the Commission to establish a national do-not-call list, that the "telephone solicitations" that would be restricted by such a list should not include calls or messages to "any person with whom the caller has an established business relationship."[1] The Commission's rules currently define an "established business relationship" to mean

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with *or* without an exchange of consideration, on the basis of an inquiry, application, purchase or ti-ansaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[2]

That definition is sufficient to enable cable operators to communicate with their existing customers regarding the full range of services that their systems offer

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1 47 U.S.C. § 227(a)(3)

2 J7 C F.R § 64.1200

In its Notice of Proposed Rulemaking in this proceeding, however, the Commission asks whether the delinition should be narrowed for purposes of a national do-not-call list. Specifically, the Commission asks whether it should "consider modifying the definition of 'established business relationship' so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product."[3]

As discussed above, it is precisely because cable operators now compete with a range of other wireline and wireless entities in providing packages of *different* services and products that it is more important than ever – to cable operators *and* their customers – that operators be able to keep their customers informed of the full range of offerings and promotions available to them. The modification suggested by the Commission would restrict useful and desirable communications between cable Operators and the customers with whom they have an "cstablished business relationship."

There is a clear distinction between these sorts of communications and unwanted and unsolicited calls from companies with whom the recipient has no established relationship. There is no reason why a cable customer should be required to forgo the former in order to stop receiving the latter. Any customers who *prefer* not to receive calls from the companies with whom they have established relationships can easily prevent such calls by placing their names on the company-specific do-not-call lists that all companies that engage in telemarketing arc required to maintain.

The statutory language is not, in any event, consistent with such a modified definition. The statute broadly exempts calls to persons "with whom the caller has an established business

[3] Notice, ¶ 20.

relationship," without any suggestion that the exemption may be limited to persons with whom the caller has an established business relationship *with respect to the product or service that is the subject of the call.* If thcrc is to be a single, national do-not-call list, it should exempt *all* calls to persons with whom the caller has an established business relationship – and, as discussed below, it should apply equally to companies that (like cable operators) are subject to the FTC's and the FCC's rules and companies that **(like** telephone companies) are subject only to the FCC's.

II. CABLE OPERATORS AND COMMON CARRIERS WHO OFFER VIDEO PROGRAMMING AND/OR INTERNET SERVICES SHOULD BE SUBJECT TO THE SAME RESTRICTIONS ON TELEMARKETING.

Congress specifically authorized the Commission to establish a national do-not-call list, and set forth certain ground rules regarding how such a list should apply. The FTC is currently considering the adoption of a national do-not-call list pursuant to its own consumer protection jurisdiction, even though it has no similarly specific authorization to adopt such a list.[4]

There is no reason why there should be two separate do-not-call lists, subject to two separate regulatory regimes. To the extent that a national do-not-call list promotes a federal policy interest, there should he a single set of rules and procedures – and a single list.

Two separate lists and sets of rules would be confusing to consumers and unduly burdensome to companies that engage in telemarketing. But these are not the only reasons why uniformity is important. Because the FTC'sjurisdiction does not extend to all companies – and specifically does not extend to companies that *compete* with cable operators and others that would be subject only to the FCC's do-not-call restrictions – uniformity is necessary in order to ensure fair marketplnce competition It would not be fair, for example, to allow telephone

[4] See Telemarketing Sales Rule, Notice of Proposed Rulemaking, 67 Fed. Reg. 4492 (Jan. 30, *2002)*

companies to market DSL high-speed Internet service *to* customers of their telephone service who are on a national do-not-call list but prohibit cable operators from using the phone to market cable modem service to customers of their cable television service who are on such a list.

Therefore, the FCC's determinations in this proceeding should be coordinated with the FTC's decision-making in its pending telemarketing proceeding. There is no justification for imposing restrictions on cable operators in connection with a national do-not-call list that do not apply with equal force and effect on common camers who offer services in competition with cable operators. What this means is that any rules adopted by the FCC (which would apply to cable operators *and* common carriers) should be no less restrictive than any rules adopted by the FTC (which would apply to cable operators but *not* to common camers). If the FTC chooses to implement a national do-not-call list, the FCC's rules should adopt rules extending any do-not-call restrictions adopted by the FTC to the entities not subject to the FTC's jurisdiction.

In coordinating its rulemaking with the FTC's, the FCC should advise the FTC of the desirability of an "established business relationship" exemption from any national do-not-call restrictions. Because such an exemption would, by statute, apply to any FCC national do-not-call list, the failure to include such an exemption in any FTC rules would impose an unfair competitive disadvantage on cable operators vis-B-vis their common carrier competitors even if the FCC adopted rules otherwise extending national do-not-call restrictions on common carriers.

CONCLUSION

For the foregoing reasons, the Commission should coordinate its decision-making in this proceeding with the FTC's deliberations in its pending telemarketing proceeding *to* ensure that all competitors in the provision of broadband services are subject to the same telemarketing restrictions. If there is *to* be a national do-not-call list, there should be an exemption – for *all*

competitors – lor calls to persons with whom the caller has an established business relationship, and the exemption should apply even if the caller is marketing a different product or service than one that the customer has already purchased.

Respectfully submitted,

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